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APR 21 1904

JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES

HEWIT AS TRUSTEE

vs.

THE BERLIN MACHINE WORKS.

No. 228.

By permission of the Court, I file this memorandum.

In Holden vs. Stratton, 191 U. S. 115, there was an *application made by the bankrupts* for exemptions of life insurance which was denied by the referee in bankruptcy. There was no *claim presented by any creditor* such as is contemplated by the Bankruptcy Act. In our case the Berlin Machine Works filed a claim (page 9, folio 26, "In the matter of claim of, etc.") This claim was rejected by the referee (page 13) and allowed by the District Judge at the value of the machinery, to wit, $1,200., making it a priority claim and allowing it for the balance of the debt (over $650., folio 105) as an unsecured general creditor (page 36, folio 106). An appeal was taken to the Circuit Court of Appeals from the judgment of the District Court, allowing the claim and an appeal was taken to this Court from the final decision of the Circuit Court of Appeals, allowing the claim after obtaining a certificate that the determination of the question involved in the allowance of the claim was essential to a uniform construction, etc. This case was taken to the Court of Appeals by appeal (see prayer for an appeal at foot of page 6, and allowance of appeal, folio 21). The decision of the Circuit Court of Appeals was a judgment allowing a claim of $500. or over.

It can make no difference what language is inadvertently used in the record; this case was in fact brought here as shown by the record, by appeal and the precaution was taken to bring it into the Circuit Court of Appeals, both by petition to review and upon appeal (folio 21, page 39) and it does not seem right to take an unfavorable view of the technical procedure. Why not overlook technicalities as the Counsel have done, and decide the merits?

How can this Court give any force or meaning to Section 25 A and B, if it denies to itself the right of hearing an appeal "from any final decision of a Court of Appeals allowing or rejecting a claim under the Bankruptcy Act." This is a new provision and renders the decisions under the Act of 1867 unavailing. If this Court now holds that because the allowance of a claim is not the end of the bankruptcy proceedings, that therefore the decision below is not final and not appealable, then of necessity the language of Section 25 A and B is rendered a nullity so far as allowing an appeal to the Supreme Court "*from the allowance of a debt or claim.*"

The Bankruptcy Court after filing the petition in bankruptcy has jurisdiction of the parties and subject matter and an independent suit cannot be maintained against the Trustee for the allowance of a debt or claim but claimant must come in and prove his claim as he has done in this case. (Sec. 57.)

The new provision in the Bankruptcy Act does not say an appeal may be had to the Supreme Court from the final order in the bankruptcy proceedings in which a claim was allowed or rejected or from a final judgment in an independent plenary action allowing or rejecting a claim but does read, "From any final decision of a Court of Appeals allowing or rejecting a claim UNDER THIS ACT." (Sec. 25 B.)

Any other construction of the Act would prevent any creditor or trustee from having the Supreme Court pass upon any claim however large the amount involved or however conflicting the decisions of the courts below might be.

The conflicting decisions of the court below, upon the points raised under Section 70 of the Bankruptcy Act, ought to inspire this Court to find a way to decide this appeal on the merits and I confidently expect it will do so.

Dated April 18th, 1904.

FRANK H. ROBINSON,

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